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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

D4

APR 19 2004

FILE: WAC 03 228 51968 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner operates a resort. It desires to employ the beneficiary as a dining attendant for nine months. The director determined that the petitioner had not submitted a temporary labor certification from the Department of Labor (DOL) or notice stating that such certification could not be made and denied the petition.

On appeal, the petitioner submitted the Application for Alien Employment Certification (Form ETA 750). The petitioner states that she failed to resubmit the ETA 750 when she filed for premium processing.

An H-2B petition for temporary employment in the United States shall be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv)(A).

The petition was filed on August 4, 2003. The petitioner subsequently filed for premium processing on October 23, 2003, and states that she neglected to resubmit the ETA 750. On appeal, the petitioner submitted Form ETA 750 that had been submitted to the Department of Labor for certification and approved on July 18, 2003.

In this case, the petitioner did apply for a temporary labor certification prior to the filing of the petition and such certification was approved. The petitioner has also established that the position offered is seasonal and temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.